Filed 3/2/10 P. v. Smith CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DENNIS SMITH, Defendant and Appellant.	2d Crim. No. B216915 (Super. Ct. No. F428003) (San Luis Obispo County)

Dennis Smith appeals from the judgment entered following a court trial at which he was determined to be a mentally disordered offender (MDO). (Pen. Code, § 2960 et seq.)[1] Appellant contends that the commitment offense, battery against a custodial officer (§ 243.1), did not involve the use of force or violence, and the evidence does not support the finding that appellant, by reason of his severe mental disorder, poses a substantial danger to others. (§ 2962, subd. (d)(1).) We affirm.

Facts and Procedural History

While in custody on an arson charge, appellant was asked by a corrections officer to put his hands through the bars so that he could be handcuffed. Appellant refused to comply. When the officer entered the jail cell, appellant suddenly

[1] All statutory references are to the Penal Code.

became agitated and struggled with the officer, and then spit on the officer. Appellant said that he spit "because the officer was a fucking nigger."

Appellant was convicted by plea of battery on a custodial officer in violation of section 243.1 and sentenced to state prison in 2008.

On January 26, 2009, the Board of Prison Terms (BPT) determined that appellant met the MDO criteria and required treatment. Appellant filed a petition challenging the BPT determination and waived jury trial. (§ 2966, subd. (b).)

Doctor David Fennel, a psychiatrist, testified that appellant has suffered from a severe mental disorder, schizophrenia paranoid type, for over 20 years. The mental disorder is manifested by paranoid and grandiose delusions in which appellant believes he can be infected watching television, is a member of the FBI and a sheriff's search and rescue team, and is the CEO of a leather business that is in the midst of a marketing campaign.

Doctor Fennel opined that appellant met all the MDO criteria, that the commitment offense involved the use of force or violence, that the severe mental disorder was not in remission and could not be kept in remission without treatment, and that appellant represented a substantial danger to others by reason of the mental disorder.

Use of Force or Violence

Appellant asserts that that the commitment offense, battery on a custodial officer in the performance of his duties, is not a crime involving the use of force of violence within the meaning of section § 2962, subdivision (e)(2)(P)). The MDO statutes apply only to prisoners serving sentences for crimes set forth in section 2962, subdivision (e). (*People v. Butler* (1999) 74 Cal.App.4th 557, 560.) That subdivision lists specific crimes and additionally provides: "A crime not enumerated . . . in which the prisoner used force or violence" is a qualifying offense. (§ 2962, subd. (e)(2)(P).)

Appellant claims that he merely spit in disrespect and that it was a "slight touching" without anger or agitation. Doctor Fennel reviewed the probation report and testified that appellant suddenly became agitated, struggled with the officer, and then spit on the officer. The doctor opined that it was more than just a spitting incident and that the battery involved the use of force or violence. (See e.g., *People v. Clark* (2000) 82 Cal.App.4th 1072, 1084 [force criterion met where defendant grabbed money from victim who resisted and struggled].)

"We have previously held that a qualified mental health professional may render an opinion on the force or violence criterion and may rely on the probation report from the underlying case in formulating that opinion. [Citations.]" (*People v. Martin* (2005) 127 Cal.App.4th 970, 976.) Doctor Fennels' expert opinion, based on the circumstances of the commitment offense as described in the probation report, constitutes substantial evidence and supports the finding that the conviction is a qualifying offense. (*Id*., at p. 977.)

Appellant's reliance on *People v. Anzalone* (1999) 19 Cal.4th 1074 is misplaced. There, the California Supreme Court held that an unarmed robbery committed without the use of actual force did not fall within the catch-all provision of section 2962, subdivision (e)(2)(P). (*Id*., at p. 1076.) In response to *Anzalone*, "the Legislature amended section 2962 to include subdivision (e)(2)(Q) which added as a qualifying offense ' "[a] crime in which the perpetrator expressly or *impliedly threatened another* with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used." ' [Citation.]" (*People v. Green* (2006) 142 Cal.App.4th 907, 912, fn.2.)

The trial court reasonably concluded that that the commitment offense qualified under the MDO statute as either a crime involving the use of force and violence (§ 2962, subd. (e)(2)(P)), or in the alternative, a crime in which appellant

impliedly threatened another with the use of force or violence likely to produce substantial physical harm (§ 2962, subd. (e)(2)(Q)). Appellant struggled with the officer in a confined jail cell before spitting on the officer. It was a battery and involved the willful use of force or violence. (§§ 242; 243.1.) Had it been merely a spitting incident, appellant would have been convicted of battery by gassing (§ 243.9, subd. (a)).

Substantial Danger to Others

Appellant argues that the evidence does not support the finding that he represents a substantial danger of harm to others by reason of the mental disorder. Doctor Fennel opined that appellant posed a substantial danger based on appellant's history of violence, appellant's altercations with peers at Atascadero State Hospital, and appellant's poor impulse control.

Before appellant committed the current offense, he assaulted an inmate in a county jail. The next day, appellant threatened to kill a member of a church in Fresno. Appellant claimed there was something "nefarious" about the church and "the person just needed to be killed."

After appellant was convicted of the current battery offense and was transferred to Atascadero State Hospital, appellant engaged in heated verbal exchanges with patients about the television. Doctor Fennel opined that appellant's altercations could rapidly escalate to physical violence and that appellant's grandiosity, sense of entitlement, irritability, and rapid mood changes put appellant at an increased risk of violence.

Doctor Fennel stated that appellant would probably not take his medication if released and that appellant has a history of substance abuse. When appellant abuses drugs, it "has a really deleterious effect on his underlying mental disorder. If can further increase his irritability, destabilize his mood even further, [and] put him at increased risk" of violence. The doctor cited appellant's failure to

report or obtain treatment while on parole which caused things to "go from bad to worse. . . ." Appellant suffered an exacerbation of his illness and was overtly psychotic.

Appellant claims that he has committed no acts of violence at Atascadero State Hospital and that Doctor Fennel's opinion is based on a single incident and a "nonexistent 'history' of violence." Citing *People v. Gibson* (1988) 204 Cal.App.3d 1425, appellant argues that a prisoner's criminal history does not support a finding of present dangerousness.

Under the MDO statute, " 'substantial danger of physical harm' does not require proof of a recent overt act" of violence. (§ 2963, subd. (f); *In re Qawi* (2004) 32 Cal.4th 1, 24.) A mental health professional may and should take into account the prisoner's entire history in making an MDO evaluation. This includes prior violent offenses as well as the prisoner's mental health history. (*People v. Pace* (1994) 27 Cal.App.4th 795, 799.) Whether the prisoner "is mentally ill and dangerous either to himself or others . . . turns on the meaning of facts which must be interpreted by expert psychiatrists and psychologists." (*Addington v. Texas* (1979) 441 U.S. 418, 429 [60 L.Ed.2d 323, 333].)

Doctor Fennel's expert testimony is uncontroverted. In a sufficiency of the evidence appeal, we may not reweigh the evidence or determine the credibility of witnesses. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082-1083.) Appellant's prior acts of violence, threats of violence, verbal altercations, and substance abuse problems shows that appellant, by reason of his mental illness, has serious difficulty controlling his behavior and is a substantial danger to others. (See e.g., *In re re Howard N.* (2005) 35 Cal.4th 117, 131-132.)

The trial court did not err in finding that appellant was an MDO. "The purpose underlying the MDO law is to protect the public by identifying those

offenders who exhibit violence in their behavior and pose a danger to society. (§ 2960.)" (*People v. Dyer* (2002) 95 Cal.App.4th 448, 455.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Roger Randall, Judge

Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

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